35. It is a well established principle that Congress has the ability to impair contractual obligations. Continental Illinois National Bank and Trust Co. v. Chicago R.I. and P.R., 294 U.S. 648, 669 (1935); Hanover Nat'l Bank v. Moyses, 186 U.S. 181, 185 (1901); Ames v. Merrill Lynch, 567 F.2d 1174, 1179 (2d Cir. 1977). As well, it is clear that Congress may, without violating the Due Process clause, enact legislation imposing new economic burdens if it is justified by a legitimate legislative purpose. Pension Benefit Guaranty Corp v. R.A. Gray & Co., 467 U.S. 717, 729 (1984); Licari v. Comm'r of Int'l Revenue, 946 F.2d 690, 693 (9th Cir. 1984). Accordingly, contrary to the Comments of the cable industry, there is no absolute constitutional prohibition against Section 628 despite its effect on existing contractual obligations.

36. The Commission should not consider Section 628 a "retroactive" statute. Congress never intended to delay implementation of Section 628. Congress did not make program access a high-priority item with a 180 day "trigger

date," only to have the regulations lie dormant for three to five years or longer.[18]

37. Even if it is determined that Section 628 is "retroactive," certain commentors have suggested to the Commission that Bowen v. Georgetown Univ. Hosp., 488 U.S. 204 (1988) is the controlling case.[19] They failed to recognize, however, an equally authoritative conflicting line of decisions based on Bradley v. School Board of Richmond, 416 U.S. 696 (1974). In Bradley, the Supreme Court held that a statute is presumed retroactive "unless doing so would result in manifest injustice or there is a statutory direction or legislative history to the contrary." Bradley, 416 U.S. at 711. (emphasis added). In October of 1992, the Eleventh Circuit confirmed that "[o]ur own decisions on retroactivity questions have applied the Bradley analysis." Baynes v. AT&T Technologies, 976 F.2d 1370, 1373 (11th Cir. 1992). Additionally, the Supreme Court, recently commented that "[w]e need not in this case, however, reconcile the two lines of precedent represented by

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18/ In fact, even a representative of the cable industry recognized that the Commission is required to proceed with Section 628 rulemaking at "break-neck speed" in order to meet the Congress-imposed 180 day deadline. Time Warner Comments at p. 51.

19/ Superstar Comments at p.63; Time Warner Comments at p. 32; and, Viacom Comments at p. 29.

Bradley, and Georgetown [Bowen], because under either view, where the congressional intent is clear, it governs." Kaiser Aluminum and Chemical Corp v. Benjamin, 110 S.Ct. 1570, 1577 (1990).

38. Under Bradley, to determine "manifest injustice," three elements are considered: "(a) the nature and identity of the parties, (b) the nature of their rights, and (c) the nature of the impact of the change upon those rights." Id. at 717. The first element focuses on the difference between private disputes and issues of great national concerns. Baynes, 976 F.2d at 1373. The express purpose of Section 628 is national in scope:

> ...to promote the public interest, convenience, and necessity by increasing competition and diversity in the multichannel video programming market, to increase the availability of satellite cable programming and satellite broadcast programming to persons in rural and other areas not currently able to receive such programming, and to spur the development of communications technologies. Section 628(a).

39. The second element concerns the conditional nature of the rights of the parties. As already discussed above, Congress has the power to impair contractual obligations. Additionally, as Congress has recognized that vertically integrated programmers discriminate against non-affiliated

cable operators and non-cable distributors, the rights created under existing programming contracts were created in a non-competitive marketplace. Congress clearly did not intend to preserve indefinitely the very contracts that caused Congress to adopt corrective legislation in the first instance. Congress never intended to maintain the status quo.

40. The third element questions whether the impact unfairly imposes "new and unanticipated obligations" on the parties. Bradley, 416 U.S. at 720. Section 628 does not impose any liability on programmers for actions that were performed prior to the 1992 Cable Act. Rather, Section 628 merely addresses existing contracts that violate the new law. Affiliated programmers and cable operators will not be liable for their past discriminatory actions.

41. Under the Bradley analysis, there is no "manifest injustice" given the important national concerns and the justified impact on affected MVPDs. Even if it is determined that the legislation is "retroactive," therefore, Section 628 can be applied to existing programming contracts.

42. The existing contracts were negotiated in a non-competitive market. It is up to the Commission to allow aggrieved MVPDs the opportunity to have a "fresh look" at these discriminatory contracts.20/ By applying Section 628 to existing contracts, the Commission will encourage the re-negotiation of contracts on a competitive basis in a now-regulated marketplace, exactly what Congress intended. To do otherwise would maintain the status quo which Congress has already determined requires adjustment.

C. Congress Created One Class of Multichannel Video Programming Distributors Protected from Discrimination.

43. In their Comments, some satellite cable programming vendors and satellite broadcast programming vendors attempt to portray vast differences in cable and Home Satellite Dish ("HSD") operations. They argue that the nondiscrimination requirements do not apply to both HSD and

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20/ The Commission utilized a similar "fresh look" approach in the Matter of Competition in the Interstate Interexchange Marketplace, Memorandum Opinion and Order on Reconsideration, 7 FCC Rcd 2677 (1992). In order to boost the level of competition for 800 services, the Commission adopted an interim regulatory approach that allowed customers to terminate contracts, without liability, within a certain window of time. "Implicit in our decision to adopt 'fresh look' is a finding that AT&T's termination liability clauses will be unreasonable in light of the risk of leveraging in 800 services." Id. at 2682.

cable distributors because the two services are not "like."[21/]

44. As a preliminary matter, the Commission could easily find that HSD and non-HSD distribution services are "like services." As the Commission tentatively concluded years ago:

> 'The satellite carrier offers the same programming in a scrambled format, using the same uplink facilities, transponder capacity, radio frequencies, and receiving technology' to serve earth station distributors and cable operators that receive superstation and network station programming, and any differences in service do not appear to be material functional differences from the customer's perspective.[22/]

The programming signal transmitted from the satellite is ubiquitous -- it generally covers CONUS. The signal viewed

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21/ See, e.g., Comments of Superstar Connection at pp 12-30; Comments of Liberty Media Corporation.

22/ Further Notice, 55 Fed Reg 27478 (July 3, 1990), at ¶ 9; citing Report, 5 FCC Rcd 523, 530 (1989). In its Second Report, 6 FCC Rcd 3312, 3316 (1991), the Commission indicated that no conclusive determination had yet been made as to whether satellite carrier services to cable operators and HSD distributors are "like" under a Section 202(a) type of analysis.

by the ultimate subscriber -- whether cable or HSD -- is the same.23/

45. In light of the new program access legislation, however, the question of whether cable and HSD or any other type of distribution service is "like" is completely irrelevant. Congress created one class of "multichannel video programming distributors" entitled to protection from discrimination. MVPDs are distributors who make available for purchase, by subscribers or customers, multiple channels of video programming. The definition includes, but is not limited to, a cable operator, an MMDS service, a DBS service and a TVRO (HSD) satellite program distributor. 47 U.S.C. § 531(12). Congress determined that all MVPDs are entitled to protection from discrimination under the Cable Act. The need to determine "likeness" between or among such services, therefore, is completely irrelevant under the statute.

46. "Likeness" is nothing more than an attempt by the cable and satellite carrier industries to escape from the program access provisions of the Cable Act. It is just one more unnecessary roadblock, and it is totally unjustified.

23/ Diagrams depicting "Cable Distribution," "HSD Distribution," and "Video Distribution Systems for Home Delivery" are attached hereto as Exhibits A, B and C, respectively.

Congress flatly prohibited discrimination in the provision of satellite cable programming and satellite broadcast programming among or between all MVPDs.[24/] The relevant statutory definitions are absolutely clear on this point and prevent the Commission from imposing any superfluous "likeness" requirement.

D. The Commission Should Adopt a Broad Attributable Interest Standard

47. In its Notice, the Commission asked whether it should use the attribution standard generally applicable to the broadcast industry (i.e., the five percent ownership standard), or whether it should use some type of behavioral guidelines to determine "control" irrespective of the attribution standard. As **NRTC/CFA**, **WCA**, **DirecTV** and others pointed out in their Comments, however, in adopting Section 628 Congress was not concerned with "control." Instead Congress was keenly concerned about inappropriate

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24/ "Satellite cable programming" means video programming which is transmitted via satellite and which is primarily intended for the direct receipt for cable operators for their retransmission to cable subscribers but does not include satellite broadcast programming. Section 628(i)(1). "Satellite broadcast programming" means broadcast video programming when such programming is retransmitted by satellite and the entity retransmitting such programming is not the broadcaster or an entity performing such retransmission on behalf of and with the specific consent of the broadcaster. Section 628(i)(3).

incentives resulting from vertical integration, as well as the potential of cable concentration to reduce the number of media voices. Within that context, **NRTC/CFA** and others noted that the five percent broadcast attribution standard may well be insufficient to correct the problems Congress associated with vertical integration in the cable programming market.25/

48. **NRTC/CFA**, **WCA** and others pointed out that the cable industry itself had supported a one percent attribution standard and opposed the five percent standard as being inadequate to prevent abuses of power and undue influence in the video distribution market. When commenting on the Commission's proposal to liberalize the "cable/telco" cross ownership restrictions, cable operators argued that the potential for abuse and discrimination by the telephone companies was simply too great to be controlled by the five percent broadcast attribution rule.26/

49. Now, in this proceeding, the cable television industry has generally leapt to the conclusion that the

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25/ See, e.g., WCA Comments pp. 22-28; DirecTV Comments, pp. 12-15.

26/ See, Telephone Company-Cable Television Cross-Ownership Rules, Second Report and Order, 7 FCC Rcd 5781, 5800 (1992).

Commission should use a 50 percent standard for purposes of determining whether a cable operator is "vertically integrated" with a programmer under Section 628.[27/] The suggestion is ludicrous.

50. "Influence" is not tantamount to control. At most, the Commission should adopt the five percent broadcast standard with appropriate modifications to minimize the potential for undue influence and control.[28/] For instance, the "single majority stockholder" exemption is entirely inappropriate within this context and should be deemed inapplicable. Non-voting and minority stockholders may have significant influence over a programmer's contract decisions even if they do not have the ability to exercise "control."[29/]

51. As the **WCA** pointed out in its Comments, in crafting an appropriate attributable interest standard it is important for the Commission to keep in mind that the sole "sanction" to be imposed for a "violation" of the vertical integration standard is the imposition of non-discrimination

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27/ NCTA Comments at p. 18.

28/ See, WCA Comments and DirecTV Comments, supra at n. 24.

29/ See DirecTV Comments at p. 13.

requirements. Unlike the broadcast and cable/telco attribution rules, the program access provisions do not require divestiture in the event of a "prohibited" ownership interest. Rather, all that is required if it is determined that a programmer is vertically integrated is that the programmer not discriminate against other MVPDs. This is a modest requirement. The Commission should adopt an appropriately broad standard of attribution to implement it.

E. The Commission Must Require Programmers to File "General Rate Structures" to Facilitate the Prompt and Meaningful Resolution of Complaints

52. The goal of this proceeding from the vantage point of the Commission and all interested parties should be to establish strong, clear program access rules that result in a minimal number of complaints being filed with the Commission. Easy, inexpensive and fast procedures are required in order to make the complaint process workable. As many MVPD commentors pointed out, however, it is necessary for the Commission to keep in mind as it develops appropriate enforcement procedures that the "best evidence" of discrimination is in the hands of the programmers themselves. Such evidence is rarely available for review by distributors.

53. The Cable Act contemplates using cable rates as a "baseline" for analyzing the discrimination problem. **NRTC/CFA** suggests that the Commission require programmers to file annual "General Rate Structures" ("GRS") with the Commission that specify the particular rates paid for programming over the previous twelve (12) months by cable operators.30/ The GRS should be constructed in the most objective and meaningful way in order both to minimize the reporting burden on programmers and to provide the baseline information necessary to determine discrimination. NRTC/CFA suggest that the GRS contain at a minimum:

(1) the Average Monthly Cable Subscription Rate paid by cable operators calculated by the total annual subscription revenues paid to be programmer by cable operators divided by the sum of the total subscribers provided programming by cable operators for each month of the annual twelve (12) month reporting period;

30/ "Rate cards" are misleading. It has been NRTC's experience that cable deals are often conducted "off the rate card." In order to analyze discrimination complaints, the Commission must focus its efforts on what was actually paid for programming.

(2) the twenty (20) lowest and the twenty (20) highest Average Monthly Individual Operator Subscription Rates paid by individual cable operators or entities representing cable operators, calculated for each individual cable operator or entity representing a cable operator or cable operators using exactly the same methodology as used in determining the Average Monthly Cable Subscription Rate;

(3) the volume discounts, packaging variations and other legitimate offerings of service that are specific to each of the twenty (20) highest and twenty (20) lowest Average Monthly Individual Operator Subscription Rates disclosed in (2) above; and

(4) a description of all specific adjustments to rates that resulted from each volume discount, packaging variation or other offering of service.

This type of information is routinely published in cable trade press and should be readily available to the programmers.

54. All MVPDs are entitled to receive programming at rates and discounts identical to those received by the cable industry. An MVPD would establish a prima facie case of discrimination if the prices, terms and conditions offered to the MVPD are different in any respect from the GRS on file with the Commission.31/

55. Upon presentation of a prima facie case, the burden of proof would shift to the programmer. The statutory exceptions providing justifications for discrimination would then become the only affirmative defenses available to the programmer to justify differences in the GRS and the prices, terms and conditions offered to the MVPD. Once a programmer asserts an affirmative defense, meaningful discovery procedures must be established to allow distributors to obtain necessary and relevant evidence from programmers to support the claimed justification.

56. In evaluating affirmative defenses, the Commission is limited to applying only the specified statutory exceptions. "Cost" defenses in particular must be viewed with a great deal of skepticism in light of Congressional

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31/ Although the GRS may reflect legitimate variations in cable rates, an MVPD is entitled to receive "whatever cable receives."

findings that all MVPDs are entitled to program access protection. In particular, the Commission must dismiss summarily the cable industry's claims that "costs" incurred by the distributor may be taken into consideration by the programmer in establishing prices, terms and conditions of site of delivery of programming. The program access provisions were intended to provide a level playing field for all distributors purchasing programming at the wholesale level. Once distributors are provided with a fair opportunity to compete, the marketplace will determine which succeed or fail depending on their costs and efficiencies of operation. Distributor costs, however, are irrelevant as a justification by programmers for discrimination.

57. The cable industry's emphasis on a brief and ambiguous colloquy between Senators Kerry and Innouye regarding the "level" of costs that may be considered is misplaced. See, e.g., NCTA Comments, at p. 27. Apparently, the colloquy was written and submitted for the record well after the debate had closed and the vote on this legislation had been entered. Moreover, it addresses only the "level" of costs incurred. In other words, if a programmer incurs costs at the distributor level, obviously those costs may be considered by the programmer in setting prices, terms and

conditions. Congress never intended, however, for costs borne by other parties to be a factor in a programmer's pricing, terms or conditions.

58. **NRTC/CFA** also encourages the Commission to consider establishment of an industry-supported "clearinghouse" to assist the Commission in processing complaints. The clearinghouse could be responsible for preliminary review and recommendations regarding the adequacy of prima facie showings by MVPDs and affirmative defenses by programmers. No clearinghouse decision would be final, and no party could be prejudiced as a result of a clearinghouse recommendation. All such decisions would be appealable to the Commission.

59. The Commission should entertain requests for status conferences between all effective parties at any stage of the proceeding. All parties should be required to attend, present relevant evidence and cooperate in the resolution of the complaint.

IV. CONCLUSION

60. The Commission must re-direct the apparent thrust of its Notice. Congress instructed the FCC to correct the program access problem by implementing rules that -- at a minimum -- prohibit discrimination. The Commission cannot impose upon distributors detailed, expensive antitrust-type requirements regarding the nebulous concept of economic "harm." Nor can the Commission lawfully "grandfather" all non-conforming, existing contracts. Congress crafted new program access laws to protect all MVPDs from discrimination. The complaint procedures proposed by **NRTC/CFA**, including the filing of "General Rate Structures," are meaningful and workable.

WHEREFORE, THE PREMISES CONSIDERED, the National Rural Telecommunications Cooperative and the Consumer Federation of America urge the Commission to consider these Reply

Comments and to proceed in a manner consistent with the views expressed herein.

Respectfully submitted,

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EXHIBIT "A"

CABLE DISTRIBUTION

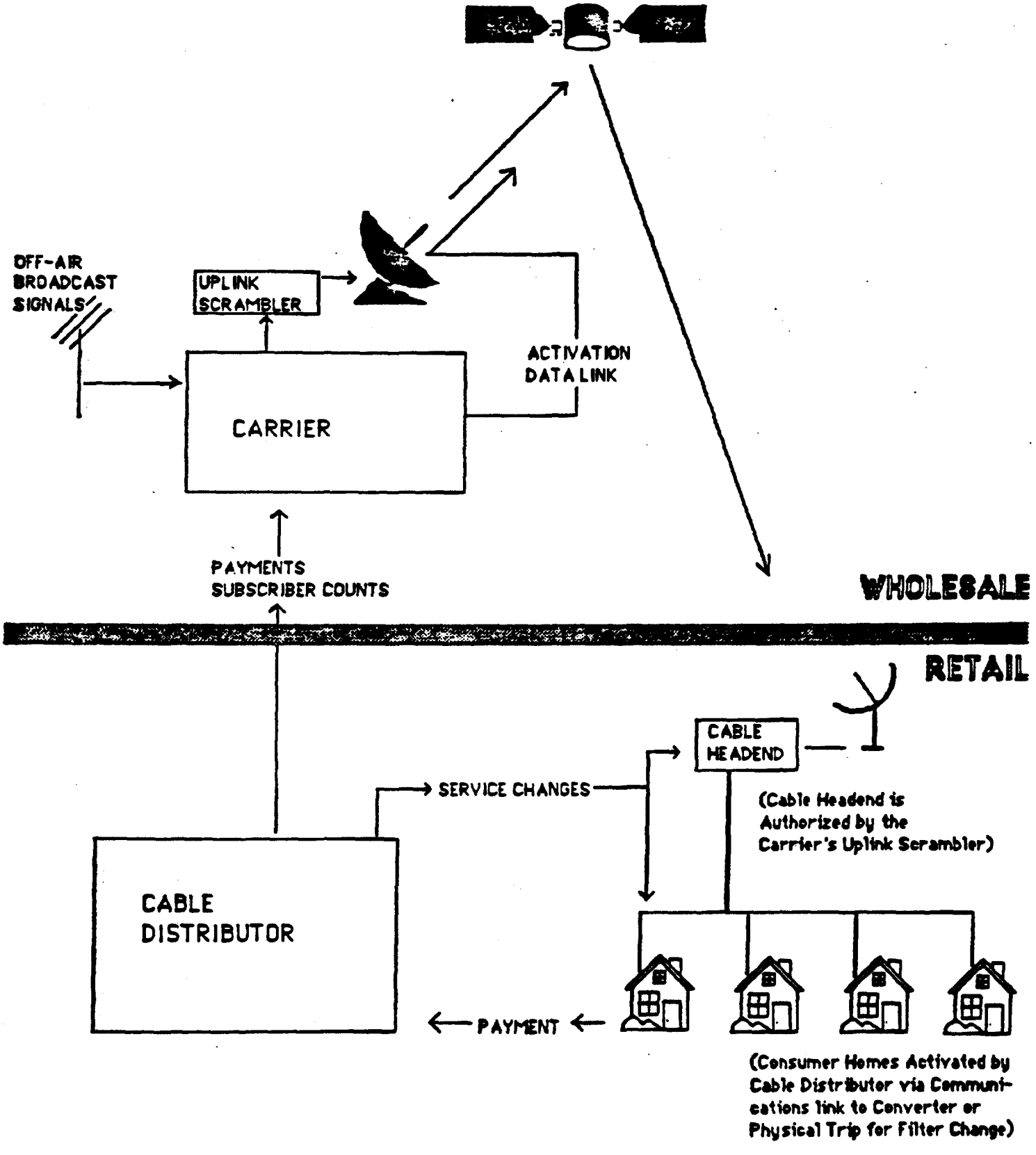
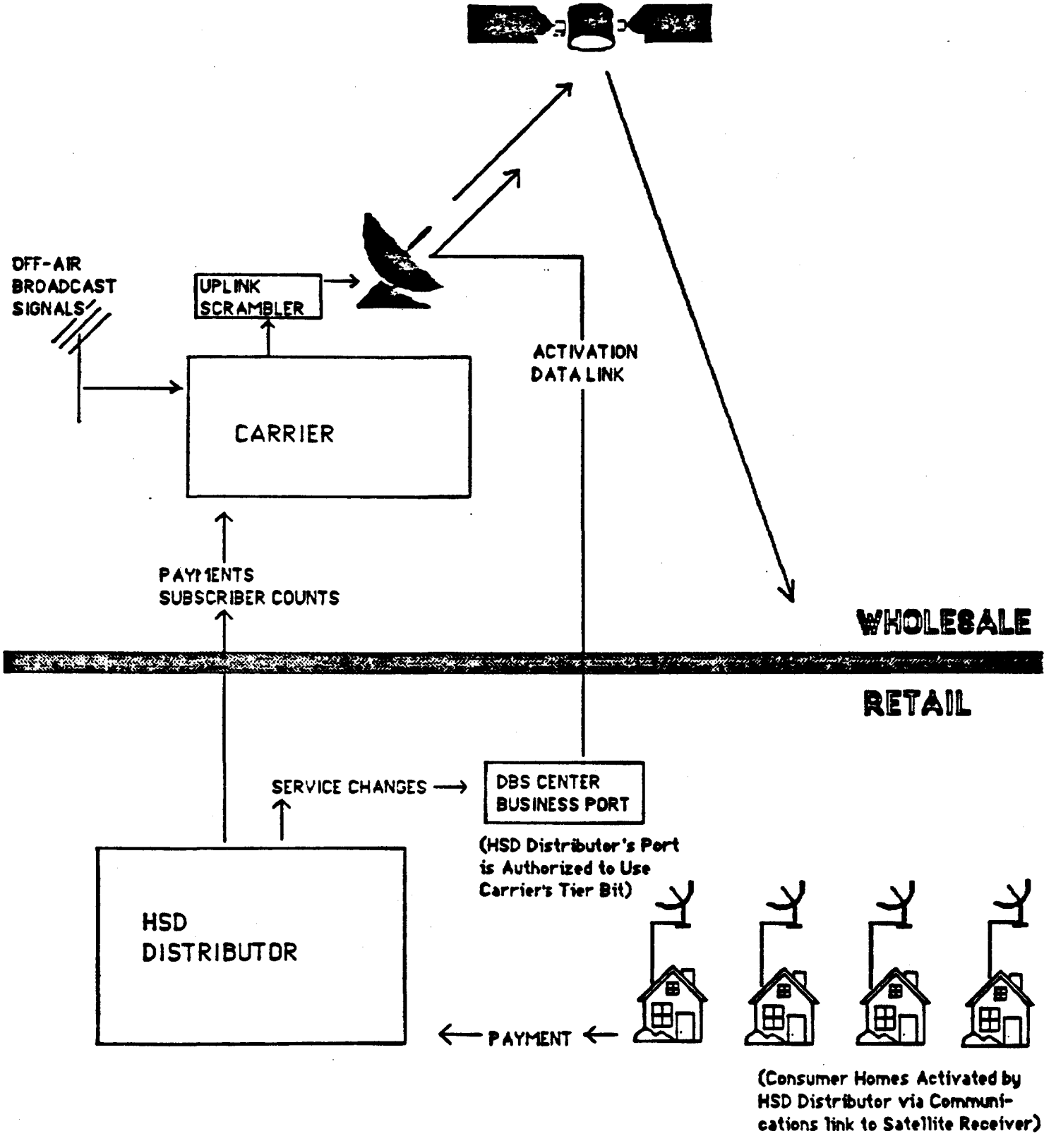


EXHIBIT "B"

HOME SATELLITE DISH DISTRIBUTION



Video Distribution Systems for Home Delivery

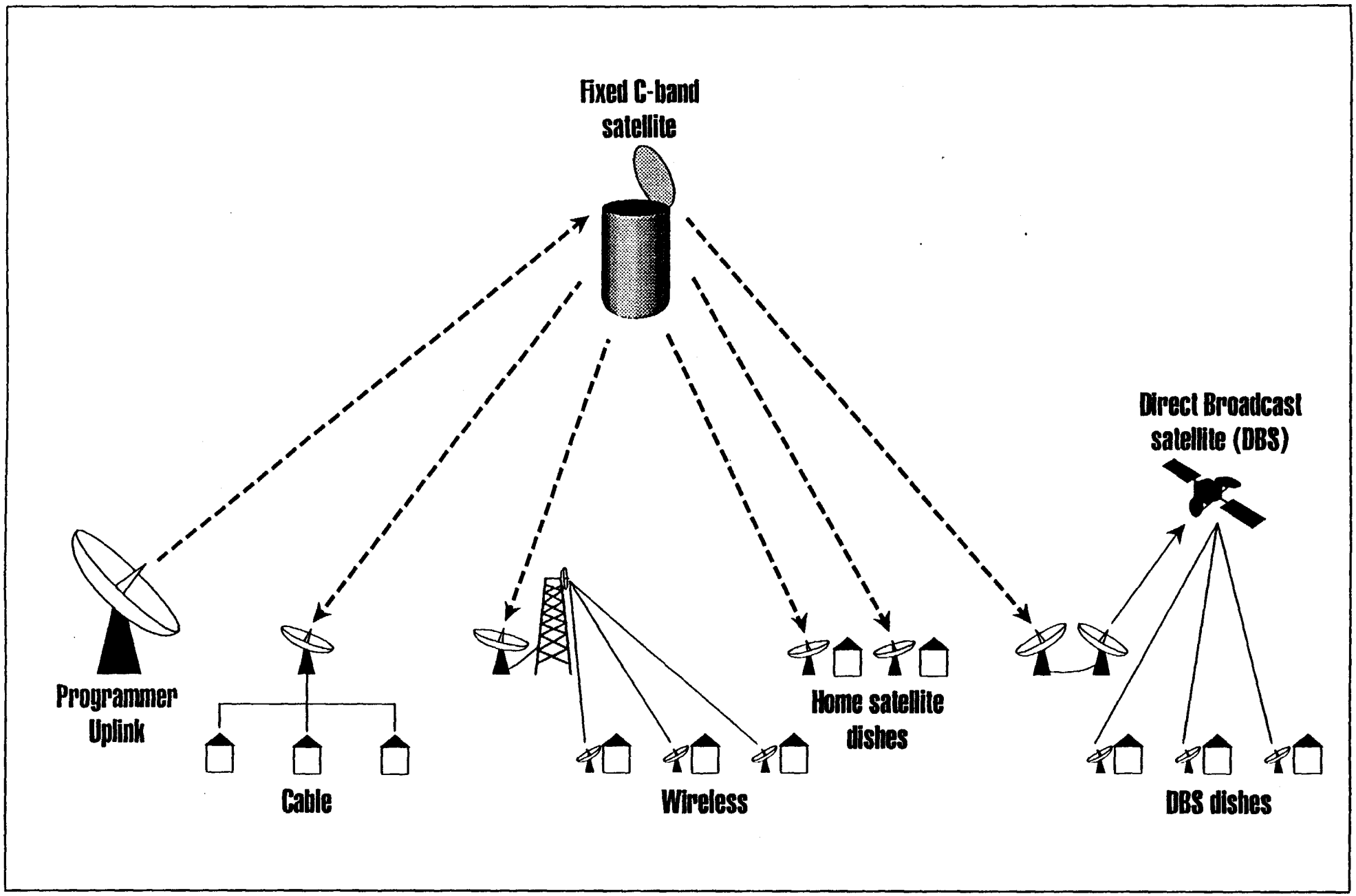


Exhibit "C"